

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO.408 OF 2016

WASUDEO SAHADEO SHIRSAT

VS

PRABHAKAR SUKHDEO LAHANE

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri A. B. Mirza, Advocate for the appellant.
Shri Vipul Bhise, Advocate for the respondent.

CORAM : A.S. CHANDURKAR, J.
DATED : AUGUST 08, 2017.

The appellant is the original defendant who is aggrieved by the judgment of the trial Court partly decreeing the suit for possession after removal of encroachment.

It is the case of the plaintiff that he is the owner of Gut No.115 admeasuring 3 Hectares 37R having purchased the same on 19-5-1992. The remaining portion of Gut No.115 was purchased by the plaintiff's brother on the same day. According to the plaintiff, the defendant illegally committed encroachment after destroying the Dhura that was constructed. The plaintiff thereafter applied to the Taluqa Inspector of Land Record for having the field measured and during the course of measurement, the encroachment of the defendant to the extent of 29R land was

noticed. Hence, suit for possession of the encroached portion came to be filed.

In the written statement, it was denied that the defendant committed any encroachment. He denied the correctness of said measurement. According to him, no portion of Gut No.115 was occupied by him as the encroacher.

After the parties led evidence including the evidence of the Measurer the trial Court held that the plaintiff had proved the encroachment by the defendant to the extent of 29R land from Gut No.115. The appellate Court has confirmed said finding and further directed an enquiry into mesne profits. Being aggrieved, the present appeal has been filed.

Shri A. B. Mirza, learned Counsel for the appellant submitted that the measurement carried out by PW-1 was not in accordance with the prescribed procedure. No proper notice was given to the adjoining land owners and without verifying the permanent boundary marks, the map in question at Exhibit-28 was prepared. According to him, as the land was "E" Class land, the Gram Panchayat should have been added as a defendant to the suit. He also submitted that the plaintiff did not file any cross-objection seeking mesne profits, but the appellate Court granted the same in an illegal manner.

Shri V. Bhise, learned Counsel for the respondent supported the impugned judgment. According to him, the plaintiff had established his title to the suit property as he had purchased the same on the basis of valid sale deed. Land admeasuring

1 Hectare 82R from Gut No.115 was owned by the plaintiff while the remaining portion was owned by his brother. As the defendant had no title in the said field, his occupation was illegal. The Measurer had rightly carried out the measurement and the encroachment was accordingly determined. He also supported the decree for grant of mesne profits.

I have heard the learned Counsel for the parties at length and perused the impugned judgments as well as the evidence on record. It has been found that the plaintiff was the owner of Gut No.115 having purchased the same by valid sale deed. PW-1 - the Measurer was examined at Exhibit-27. He placed on record the map at Exhibit-28 which indicated encroachment to the extent of 29R land. Though it was submitted that this encroachment was not determined after following the due procedure and without giving any notice to the State Authorities in absence of any title being vested with the defendant, it was not necessary to implead the State Authorities. The measurement has been carried out by the Plain Table method and this was carried out in presence of the villagers. Both the Courts have found that on the basis of this measurement, the encroachment to the extent of 29R land was duly proved. Said finding does not deserve to be interfered.

In so far as the direction to hold an enquiry into mesne profits is concerned, the same has been granted in exercise of the powers conferred by provisions of Order XLI Rule 33 of the Code of Civil Procedure, 1908. For said purpose, it was not

necessary to file any cross-objection under provisions of Order XLI Rule 22 of the Code. Hence, no substantial question of law arises for consideration. Appeal is, therefore, dismissed. No costs.

JUDGE

/MULEY/